

**STATEMENT AS TO THE BASIS FOR  
AMENDMENTS TO WAGE ORDER NO. 5  
REGARDING EMPLOYEES WORKING IN GROUP HOMES**

**TAKE NOTICE** that the Industrial Welfare Commission of the State of California (hereinafter the "IWC"), in accordance with the authority vested in it by the California Constitution, Article 14, Section 1, as well as Labor Code §§ 500-558, and 1171-1204 has promulgated amendments to Wage Order 5 regulating wages, hours, and working conditions in the public housekeeping industry. The amendments effect Sections 3 (Hours and Days of Work), 11 (Meal Periods), and 12 (Rest Periods) of employees with direct responsibility for children who are under 18 years of age or who are not emancipated from the foster care system and who, in either case, receive 24 hour care. The amendments regarding meal periods and rest periods also apply to employees of 24 hour residential care facilities for elderly, blind, or developmentally disabled individuals. These two kinds of employees are collectively referred to as group home employees in this Statement.

Prior to 1998, Wage Order 5-89 (as amended in 1993) provided that these group home employees (along with "personal attendants" as currently defined in Section 2(N) of Wage Order 5, resident managers of homes for the aged having less than eight (8) beds, and organized camp counselors) had a partial exemption from daily overtime. As long as an employee's work time did not exceed 54 hours or 6 days in a workweek, employers were not required to pay overtime. In emergency situations an employee could work over 54 hours or 6 days in a workweek, provided the employer paid overtime at one and one half times the employee's regular rate of pay. However, in non-emergency situations, if an employee worked over 54 hours or 6 days in any workweek, employers were required to pay daily overtime for all hours worked in excess of 8 in a day during that workweek.

In 1998, the IWC promulgated amendments to Wage Order 5 which included language eliminating the partial exemption from daily overtime. Instead, the IWC conformed Wage Order 5 to the federal standard of weekly overtime, rather than daily overtime, after working 40 hours in a workweek. Under that standard, as long as an employee's work time did not exceed 40 hours in a workweek, employers were not required to pay overtime. However, pursuant to the "Eight-Hour-Day Restoration and Workplace Flexibility Act" of 1999 (commonly referred to as "AB 60"), the Legislature restored daily overtime in general, and temporarily restored the provisions of Wage Order 5-89 until the IWC could promulgate new regulations to implement the statute. The new regulations became effective October 1, 2000.

According to the Wage Orders 5-2000 and 5-2001<sup>1</sup> which were promulgated pursuant to AB 60, group home employees continued to have a partial exemption from daily overtime. However, the partial exemption now provided that, as long as an employee's work time did not exceed 40 hours or 6 days in a workweek, employers were not required to pay overtime. In emergency situations an employee could work over 40 hours or 6 days in a workweek provided the employer paid overtime at one and one half times the employee's regular rate of pay. In non-emergency situations, if an employee worked over 40 hours or 6 days in any workweek, employers were required to pay daily overtime for all hours worked in excess of 8 in a day during that workweek.

---

<sup>1</sup> Order 5-2001 merely made technical corrections to Order 5-2000.

In February 2001, the IWC received a request from the California Alliance of Child and Family Services to amend Wage Order 5 to reinstate the former partial exemption allowing employees to work 54 hours or 6 days in a workweek before payment of overtime. The IWC also received public comment regarding such an amendment via the U.S. mail, hand delivery, and facsimile and electronic transmissions. In addition, the IWC heard testimony from employee and employer representatives of this industry at its public meetings. Proponents of the reinstatement of the former partial exemption state that the current provisions are too restrictive. For example, under the current provisions of Wage Order 5, if an employee works a 50-hour workweek of two 20-

hour shifts and one 10-hour shift, the employer would pay daily overtime for the entire workweek because the employee's workweek schedule is in excess of 40 hours. The employee would receive one and one-half times his or her regular rate of pay after working 8 hours and two times his or her regular rate of pay after working 12 hours. Using the example above to explain the effect of a return to daily overtime only after an employee works 54 hours, if an employee works a 50-hour workweek of two 20-hour shifts and one 10-hour shift, the employer would pay federal weekly overtime after 40 hours, but no daily overtime.

Based upon comments that the partial exemption is too restrictive, the IWC conducted a preliminary investigation regarding group home employees pursuant to Labor Code §§1173, 1178, and 1178.5. In accordance with Labor Code § 1178, the initial investigation included a public hearing held March 2, 2001.

The IWC received public comment to the effect that the employment settings at issue generally are residential group homes that are small, home-like environments for foster care children, the developmentally disabled, and assisted residential care for the elderly and blind, where, from a therapeutic sense, it is ideal to provide longer shifts to simulate parenting and or family life for the individuals living in the home. Long shifts allow the residents to have the benefit of having the same care giver at night and at breakfast the next morning. For the same reasons on-duty meal and rest periods are preferable to an employee leaving the premises to eat or rest.

The testimony the IWC received suggests that these "long shifts" are also attractive to many employees who prefer to work 40-plus hours per week in three or four days and find the flexibility to be compatible with their schedules. Long shifts and short weeks are also ways in which to supplement income from another job.

In addition, these facilities are nonprofit agencies that receive 100-percent of their funding from the government. They have no ability in today's market, at today's government rates, to go out and recruit the numbers of employees necessary to have all work time covered without payment of overtime, nor do they have the ability to pass on the cost of overtime to their customers, because the government is their customer.

However, the IWC received testimony and written comment from the Service Employees International Union in California and others who represent employees working in these types of facilities, who stated that union contracts in this area provide for 8-hour days, and that the employees have no trouble working such shifts. They also reminded the IWC that, in enacting AB 60, the Legislature reaffirmed the 8-hour day as the standard in California. In addition, they advised the IWC that last year the state government increased rates for foster care group homes by 13 percent, 3 percent of it across the board and 10 percent for wages. They acknowledged that this increase was still not enough to provide adequate pay for employees, but urged that the IWC not subsidize these facilities by decreasing overtime obligations when it is the Legislature that has not provided sufficient funding. They suggested that the more appropriate course of action is to seek relief from the Legislature.

Following the investigation, and as part of its continuing duties to ascertain the wages, hours, and conditions of labor and employment of employees in the State, the IWC determined that the provisions in Wage Order 5 regarding overtime, meal periods, and rest periods may be prejudicial to the health, safety, and welfare of employees with direct responsibility for children who are under 18 years of age or who are not emancipated from the foster care system and who, in either case, receive 24 hour care. The IWC also determined that the provisions of Wage Order 5 regarding meal periods and rest periods may be prejudicial to employees of 24 hour residential care facilities for elderly, blind, or developmentally disabled individuals. The IWC therefore decided to convene a wage board to consider whether any amendments should be made to the overtime, meal period, and rest period provisions of Wage Order 5.

The Wage Board met on May 31 and July 18, 2001, and thereafter sent the IWC its report with proposed regulations that received the unanimous recommendation of the Wage Board members. Pursuant to Labor Code §1182(a), the IWC must adopt proposed regulations based on recommendations that receive the support of at

least two-thirds of the Wage Board, unless the IWC finds that there is no substantial evidence to support such recommendations.

Following its receipt of the Wage Board's report and its unanimous recommendation for proposed regulations, the IWC held additional public meetings and public hearings pursuant to Labor Code §§ 1178.5 and 1181, during which it considered the recommendation of the Wage Board, proposed new regulations amending Sections 3, 11, and 12 of Wage Order 5, and offered the public the opportunity to provide comment on the proposed regulations. No one appeared at any of the three public hearings for public comment on the proposed regulations. However, the IWC did receive a request from a member of the Wage Board to expand the applicability of the proposed overtime regulation to employees of 24 hour residential care facilities for the elderly, and blind or developmentally disabled adults. Since the Charge to the Wage Board was limited in scope, the IWC chose not to expand the scope of the partial exemption at this time.

The IWC considered all correspondence, verbal presentations, and other written materials prior to the adoption of amendments to the Order and found that there was substantial evidence for the proposed regulations that received the unanimous recommendation of the Wage Board. Accordingly, the IWC adopted the proposed regulations as amendments to Wage Order 5 on October 29, 2001. The following amendments will become effective January 1, 2002.

### **Section 3 - Hours and Days of Work**

The IWC deleted the phrase that made the provisions of Paragraph E(1) applicable to employees or who have direct responsibility for children under eighteen (18) years of age receiving 24 hour care, and added subparagraph (2) Paragraph E. Paragraph E(2) provides that:

"(2) Employees with direct responsibility for children who are under 18 years of age or who are not emancipated from the foster care system and who, in either case, are receiving 24 hour residential care, may, without violating any provision of this section, be compensated as follows:

(a) An employee who works in excess of 40 hours in a workweek shall be compensated at one and one-half (1-1/2) times the employee's regular rate of pay for all hours over 40 hours in the workweek.

(b) An employee shall be compensated at two (2) times the employee's regular rate of pay for all hours in excess of 48 hours in the workweek.

(c) An employee shall be compensated at two (2) times the employee's regular rate of pay for all hours in excess of 16 in a workday.

(d) No employee shall work more than 24 consecutive hours until said employee receives not less than eight (8) consecutive hours off-duty immediately following the 24 consecutive hours of work. Time spent sleeping shall not be included as hours worked."

The Wage Board's unanimous recommendation for this amendment included a request that the Statement as to the Basis contain two specific points. The first point is that employers should be aware that they can still pay daily overtime if they choose. The second point is that the definition of "sleeping" is intended to be consistent with the meaning in the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*, hereinafter "FLSA") and in the IWC's other wage orders that sleep time is not included in the definition of "hours worked".

The amendment of the overtime provisions regarding time spent sleeping for these **employees** to more closely resemble the federal standards promotes the IWC's intention to make the state and federal exemptions consistent where the Legislature has not expressed a clear contrary intention.

### **Section 11 - Meal Periods**

The IWC added a Paragraph E to Section 11. This paragraph provides that a group home employee may be required to work on-duty meal periods without penalty to the employer when it is necessary to regulatory or approved program standards and either the employee eats with the residents and the employer provides the same meal as the residents receive at no charge to the employee, or the employee is the sole person in charge and, on a day shift, the employer provides the meal at no charge. In addition, an employee, except when working a night shift, may exercise the right to have an off-duty meal period upon first giving 30 days notice to the employer for each instance where an off-duty meal is desired. However, the paragraph further provides that there will be no more than one off-duty meal period every two weeks.

### **Section 12 - Rest Periods**

The IWC added a Paragraph C to Section 12. Employers of group home employees may, without penalty, require such an employee to remain on the work premises and maintain general supervision of residents during rest periods if the employee is the sole person in charge of the residents. In addition, the employer must authorize and permit another rest period when an employee is affirmatively required to interrupt his or her break to respond to the needs of a resident.